No. 14,561

IN THE

United States Court of Appeals

For the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a corporation; LIBBY, MCNEILL & LIBBY, a corporation; and BELLINGHAM CANNING COMPANY, a corporation,

Appellants,

vs.

THE CITY OF YAKUTAT, a municipal corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
P. O. Box 1211, Juneau, Alaska,
Attorneys for Appellants.

FILED
MAY - 6 1955
PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Case No. 14,561

Table of Authorities Cited

Cases

Statutes

Ordinances

No. 14,561

IN THE

United States Court of Appeals

For the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a corporation; LIBBY, MCNEILL & LIBBY, a corporation; and BELLINGHAM CANNING COMPANY, a corporation,

Appellants,

vs.

THE CITY OF YAKUTAT, a municipal corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

QUESTIONS PRESENTED.

Appellants (Main Brief, pp. 16-48) present five Questions or Propositions. Neither the facts nor the law thereof has been met by Appellee in its Brief either in the Three Questions (Appellee's Bf. 6-7), into which Appellee seeks to resolve Appellants' Five Propositions nor in Appellee's Argument (Bf. 7-11).

Appellants believe that an extended Reply is neither necessary nor apposite, but they will point out what they think are a few of the most glaring mistakes or inconsistencies in Appellee's Brief.

TECHNICAL OBJECTIONS.

Appellee illogically contends that its failure to perform statutory and ordinance requirements constitutes only a technical objection (Appellee's Bf. p. 6).

Appellee entirely ignores the U. S. Supreme Court and many other decisions cited by Appellants (Bf. 17-24) that such nonperformance affected and caused Appellants to lose their substantial rights.

In its argument (Bf. p. 7), Appellee suggests that Appellants' counsel has no liking for Sec. 16-1-124, ACLA 1949 (Appellants' Main Bf. Case #13,455, pp. 10-12), and has ignored that statute, of which Appellee quotes only a portion, omitting entirely its further provisions, viz.:

> "* * * If at such hearing the court shall find any tract to be over valued, or over assessed, the same shall be adjusted on equitable principles so that the same shall bear its just proportion of the levy, and the invalidity of the tax on any one tract shall not be considered as a presumption of the illegality of the tax on any other tract. Provided, however, that if the court shall find that the assessment of the value of the property of the party objecting was so high in proportion to other property assessed as to satisfy the court that the city council in equalizing the assessment had acted in bad faith, the entire tax of the objecting party shall be held void, and the costs shall be taxed against the city. * * *"

Appellants throughout this litigation have contended that the object of those statutory provisions was to protect the taxpayers' substantial rights.

Nowhere to Appellants' knowledge have they ignored or evinced dislike of that statute, nor have they ever sought herein to obtain refund of their respective payments of the taxes for either 1950 or 1951. All they seek is to protect their substantial rights, and to prevent Appellant Yakutat & Southern Railway's real property being sold to pay taxes at exorbitant over-valuations and over-assessments.

They do claim that that property was over-valued and over-assessed, illegally and in bad faith; but they have never sought to have the entire tax declared void as authorized by the last sentence of the above quotation from Sec. 16-1-124, ACLA 1949, even though they undoubtedly were entitled to do so under the admitted nonperformance of statutory and municipal requirements which are jurisdictional.

APPELLANTS' SECOND PROPOSITION.

Appellee (Bf. 8) admits that "identical procedure was used by the Appellee for all three years, except as follows". Thereby, Appellants submit, Appellee admitted as it did in Case No. 14,562 (Appellee Bf. 23), that the assessment for the years 1950 and 1951 was made by the Board of Equalization copying the work of the previous year of the assessor, and that no assessor made an annual assessment for either 1950 or 1951, as required by statute and ordinance.

Such admission was not clearly before this Honorable Court on the first appeal in USCA9C #13,455, 206 F.2d 612.

In view of Appellee's admission (PR 40, 90, 117, 196) that its Ordinance No. 1 was in effect during the pertinent tax years of 1950 and 1951, and made no proof of any amendment to permit posting under Sec. 16-1-124, ACLA 1949, Appellants submit that Appellee cannot now urge that it was so amended.

But even assuming without conceding that the notice was posted, that does not cure any of the other jurisdictional defects in the proceedings.

Appellee's Board of Trustees' Minute Books (PR 27-64) show no such amendatory ordinance having been enacted. Appellee's present City Clerk didn't know of any such ordinance (PR 206-207; also, 213).

It seems strange that neither the City Clerk nor the City Attorney knew positively of any such amendatory ordinance.

If one were in existence, the learned trial Court would have taken judicial notice of it, had Appellee stated its title and the day of its approval, under Section 55-5-12, ACLA 1949, viz:

> "In pleading an ordinance or enactment of any incorporated city, town or village, or a right derived therefrom, in any action or proceeding, it shall be sufficient to refer to such ordinance or enactment by its title and the day of its approval, and the Court shall thereupon take judicial notice thereof."

Inasmuch as this proceeding is derogatory of the common law, the burden was upon Appellee to prove that it had an effect an ordinance authorizing post-

ing of the notice and that it was in effect on and prior to October 15, 1952.

Despite Appellee or its counsel's self selection of the manner of applying the respective payments made by Appellants, the latter specifically tendered them in full payment, and not otherwise.

Appellants challenge Appellee's assertion (Bf. 6) that its Exhibit No. 1 of itself shows the claimed tax of $2,021.20 for 1950 and of $1,639.65 for 1951 to be balances upon real property taxes, and submit that, if such fact can be shown, it is only by incompetent, extrinsic or aliunde evidence (Appellants' Main Bf. p. 32).

Appellee also apparently contends that the cry of technical objections (Appellee's Bf. p. 6) meets the facts and the law in Appellants' Second Proposition (Main Bf. pp. 24-31). Appellants submit that Appellee's brief controverts neither those facts nor that law and that their objections are jurisdictional, not technical.

APPELLANTS' THIRD PROPOSITION.

Other than for its assertion (Bf. 6), Appellee neither controverts the facts nor the law in Appellants' Third Proposition (Main Bf. pp. 31-34), except it seeks to distort this Honorable Court's opinion in Case No. 13,455, 206 F2d 612, into upholding an invalid tax levied under a special proceeding, the jurisdictional steps whereof were not taken.

APPELLANTS' FOURTH PROPOSITION.

Appellee controverts neither the facts nor the law in Appellants' Fourth Proposition (Main Bf. 35-38), other than to intimate (Appellee's Bf. p. 10) that Appellants have misapplied Chief Justice Marshall's famous statement, "that the power to tax is the power to destroy" in *McCullough v. Maryland,* 4 Wheat. 579, 607, 17 U.S. 316, 331.

Appellants contend that citation is both correct and pertinent.

APPELLANTS' FIFTH PROPOSITION.

Appellee's only answer to Appellants' Fifth Proposition (Main Bf. 39-48) is that Section 12 of its Ordinance, Exhibit A (Appendix, p. x, Appellants' Main Brief) provides for interest on delinquent taxes of 1% monthly.

That section provides:

> "On all delinquent taxes a penalty shall be added, which shall be a sum equal to interest at the rate of 12% per annum from the date of such delinqency."

The Order of Sale (PR 128-129) specifically allowed both taxes and penalty, although the Ordinance imposes no interest (Appellants' Main Bf. pp. 39, also 44).

APPELLEE'S CONCLUSION.

Appellants don't understand Appellee's charge (Appellee Bf. 11), that their counsel is seeking to emasculate a political subdivision of Alaska, because in Appellants' brief (p. 48) he stated:

> "Appellee should have refunded Appellants' remittances if it did not accept that sum in full payment of Appellants' taxes."

Appellants admit that Appellee, notwithstanding that before these proceedings were instituted and throughout them it was represented by learned practicing attorneys Wm. L. Paul, Jr., of Seattle and Juneau, and Fred Paul of Seattle, has entirely ignored all statutory and ordinance requirements not only in the purported over-assessment and over-valuation but in the preparation and presentation of these proceedings, and Appellants contend that all of those steps were jurisdictional; but, all they seek is to protect their substantial rights by not having the Appellant Yakutat & Southern Railway's real property sold for claimed taxes at exorbitant over-assessments and over-valuations. They admit the learned trial Court erred in granting Appellee's application and entering its Order of Sale.

The fact is, as everyone knows who knows anything about Alaska, that actually Appellants' property and industrial activities are the main, if not only, support of Appellee and its inhabitants and Appellants are much more interested in keeping Appellee in solvent condition than some of its present and former officials. Appellee seemingly desires to

over-assess and over-value its chief taxpayers' property in the hope of thereby putting them out of business and to its own destruction.

CONCLUSION.

Appellants respectfully renew their prayer that the Order of Sale (PR 128-129) may be vacated and set aside and Appellee's application be dismissed.

Dated, Juneau, Alaska,
April 29, 1955.

Respectfully submitted,
R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.